1992

Ohline Corporation, a California corporation v. Granite Mill, a Utah corporation : Reply Brief

Utah Court of Appeals

Gerald M. Conder; Attorney for Appellant.
Bruce T. Jones; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

OHLINE CORPORATION, a California corporation
Plaintiff and Appellant,

vs.

GRANITE MILL, a Utah corporation
Defendant and Appellee,

UTAH COURT OF APPEALS

No. 920215-CA
Priority 16

APPELLANT'S REPLY BRIEF

Appeal from the Third Judicial District Court of Salt Lake County, the Honorable Timothy R. Hanson, Judge, Presiding.

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STATEMENT OF FACTS

The parties acknowledge that 20% to 33 1/3% of the total delivery required under the contract was made timely pursuant to the courts ruling [R. 176].

Defendant/Appellee's own witness testified that from July 24 through August 4, 1989 Defendant/Appellee had thirteen men, which represented the maximum number which could be used effectively, for installation of shutter [R. 183 and 199] working regular time on nothing but installation of the shutters [R. 193]. This would result in 1,040 billable hours of regular time for installation of the shutters which was performed on nothing but installation of the shutters [R. 190 and 191]. Defendant/Appellees agent testified that no more than 1,160 hours were utilized for installation of the shutters in question [R. 190 and 196]. With 1,040 regular hours used in the installation of the shutters it would result in only 120 hours of overtime.

SUMMARY OF THE ARGUMENT

The Defendant/Appellee would have suffered the same damages if the total delivery had been made on July 22, 1989 or as made. The court is also clearly erroneous in granting the total offset and the mathematical error which has occurred should be corrected.

ARGUMENT

POINT I

THE DELAY IN SHIPMENT DID NOT INCREASE DEFENDANT/APPELLEES DAMAGES

The Defendant/Appellee through their own agent acknowledged that 1,160 hours were utilized for installation of the shutters in question [R.190 and 196]. Defendant/Appellee's witness also testified that from July 24, through August 4, 1989 Defendant/Appellee had thirteen men, which represented the maximum number which could be used effectively, for installation of the shutters [R. 193 and 199] working regular time on nothing but installation of the shutter [R. 193]. Simple mathematics would reflect that based upon Defendant/Appellees testimony 1,040 billable hours were utilized for installation of the shutters from July 24 through August 4, 1989. This would result in only 120 hours of overtime based upon Defendant/Appellees own testimony that 1,160 hours were utilized in installation of the shutters and 1,040 hours were utilized in regular time.

The court acknowledged [R. 61] that the materials should be ready for shipment by no later than July 22, 1988. In the action

presently before the court it is evident that approximately one third of the order was issued on a timely basis and that commencing the following Monday Defendant/Appellee was able to commence installation on a regular basis of eight hours per day for installation, and that the same overtime would have been utilized whether or not the entire shipment was received on July 22, 1989 or on the times as received. A party is only entitled to recover the damages actually suffered and where an error in mathematical computation has been made it should be corrected Seal v. Tayco, Inc. 400 P.2d 503 (Utah 1965).

The Defendant/Appellee has the duty to mitigate any damages which it may have incurred. Thompson v. Jacobsen 23 Ut. 2d 359, 463 P.2d 801 (Utah 1970) and Utah Farm Production Credit v. Cox 627 P.2d 62 (Utah 1981). It is evident from simple mathematics and the testimony of Defendant/Appellee's agent that regular hours of 1,040 were available for installation of the shutters which would result in a maximum of 120 hours overtime that could be utilized as an offset.

POINT II

THE TRIAL COURT IS CLEARLY ERRONEOUS IN ALLOWING AN OFFSET FOR THE TOTAL NUMBER OF OVERTIME HOURS AS REQUESTED BY THE DEFENDANT/APPELLEE

The Defendant/Appellee through their own agent testified on more than one occasion that the maximum number that could be

utilized for installation of the shutters on an effective basis was thirteen men [R. 183 and 199]. There was no testimony contrary to Mr. College's testimony regarding this issue and Mr. College the agent for Defendant/Appellee also testified that he had thirteen men working on nothing but installation of the shutters from July 24, through August 4, 1989 [R. 193].

Taking the evidence in a light most favorable to the Plaintiff and based upon the testimony of Mr. Scott College the only witness testifying as to the installation of the shutters; it took 1,160 hours for installation of the shutters. [R. 183 and 199 and R. 193]. Based upon a mathematical certainty and the testimony of Scott College the courts ruling under paragraph 13 of the Findings of Fact and Conclusions of Law [R. 62] is clearly erroneous and in fact if all of the material would have been shipped on July 22, 1989 Defendant would have suffered the same damages.

The courts findings are so lacking in support as to be against the clear weight of evidence making them thus clearly erroneous and subject to being overturned. Utah Rules of Civil Procedure 52 (a); Matter of Estate of Bartell 776 P.2d 885 (Utah 1989). Based upon the evidence in a light most favorable to the Defendant/Appellee and based upon a mathematical computation the most overtime that should have been incurred on this particular account was 120 hours.

The Defendant/Appellee is also not entitled to incidental or consequential damages under the UCC as adopted in Utah. An

expense will not ordinarily be considered as an item of incidental or consequential damage to a breach of warranty or delivery when the buyer would have incurred the claimed expense even if the product had been delivered timely or the goods had been as warranted. Delhomme Industries v. Hustead and Beachcraft 735 F 2d 177 (1984). In the present case the overtime payments made by Defendant/Appellee would have been incurred if the total delivery would have been made on April 22, 1992.

CONCLUSION

Defendant/Appellee's offsets should be denied and Judgment entered against the Defendant/Appellee based upon Plaintiff's Complaint.

RESPECTFULLY submitted this 29th day of June, 1992.

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of Plaintiff/Appellants Reply Brief, postage prepaid this 29th day of June, 1992 to the following:

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